IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 26, 2007 OPINION AND ORDER

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and moves this Court for reconsideration of its February 26, 2007 Opinion and Order [DKT #1063]. In support of its Motion, the State states as follows:

1. The Court's Opinion and Order of February 26, 2007 is based, in part, upon an erroneous understanding of the facts regarding the State's document production. The State produced its documents in the manner in which they are kept in the usual course of the State's business, including its current working files. These documents were not Bates numbered by the State. Thus, the State cannot refer to any presently existing body of Bates numbered documents to make more specific Rule 33(d) designations.

2. The State maintains work product, trial preparation and attorney-client privilege claims broader than those which were expressed in the Court's order of February 26, 2007. While the State has produced the documents referenced in its offer of production made

December 15, 2006, and incorporated in the Court's order of January 5, 2007, its consultants are continuing their analysis of the sampling data, and the State maintains its claims of work product protection for that ongoing analysis.

3. Some of the interrogatories, listed on page 11 of the Order, for which answers have been ordered require such detail and are so burdensome that literal compliance is impossible, and certainly outweighs its likely benefit, taking into account the needs of the case, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

I. Background

On February 26, 2007, this Court issued its Opinion and Order on the Tyson Defendants' Motion to Compel [DKT #1019] (the Order). In that Order, the Court held that "[a] response that references documents requires (1) that the responsive documents actually exist, and (2) that the reference to the documents be specific enough for the opposing party to locate the documents." Order at 7-8. The Court encouraged the parties to meet and confer "and determine an appropriate manner of responding that will be both helpful to the Defendants and reasonable for Plaintiff." Order at 8. The Court further held, "[a]bsent agreement by the parties to a preferred method, the Court will require Plaintiff to respond by listing responsive documents by Document Box and Bates numbers for each interrogatory." Order at 8.

While the State's production of sampling data on February 1 and 8, in fulfillment of its offer of December 15, 2006 and the Court's order of January 5, 2007, greatly narrowed the matters for which the State claims attorney work product or trial preparation materials protection, the State continues to maintain its work product and trial preparation claims for the work of its consultants in analyzing the sampling data produced in February. Further, the State has claimed

privilege over a number of documents at the various State agency productions. During the hearing, the State was trying to inform the Court that it has produced everything on the State's original privilege log, the one subject to Cobb-Vantress' first Motion to Compel, with just a few exceptions. The State provided Defendants with a supplemented privilege log on its February 1, 3, and 8 productions. The State, as stated above and in accordance with this Court's LCvR 26.4, still maintains work product claims for the work of its consultants in analyzing all data.

The Order requires the State to review its responses and submit supplemental responses for interrogatory responses containing Rule 33(d) designations within 30 days and further required supplemental answers to particular interrogatories. Certain of the interrogatories at issue, including those requiring identification of all the State's real property and all of the "chemicals" used thereon are so burdensome that the State should be protected from further responding, or, at a minimum, given additional time within which to gather such information as is available because the State does not have a centralized index of the real estate that its various agencies own or lease, or the "chemicals" used at those locations.

II. Legal Standard

Grounds justifying reconsideration include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

III. Argument

A. The Court's Order should be Modified because the State and the Defendants do not have a Common Set of Bates Stamped Documents from which to Respond.

As outlined in the Court's February 26, 2007 Order, in response to Defendants' discovery requests, the State has produced a large volume of responsive information to Defendants in this case and is in the process of producing even more.[1] The affidavits of agency record custodians, Exhibits 1-4, demonstrate that the State provided a comprehensive document production responding to requests for production and interrogatories of several Defendants. Many of these documents were produced from the State's active, working files, and from archives, in the manner in which they are kept in the usual course of business at the Oklahoma Department of Environmental Quality, Oklahoma Water Resources Board, Oklahoma Conservation Commission, and Oklahoma Scenic Rivers Commission**.**

The volume of information being produced is a function, not only of the scope of the case, but also the breadth of Defendants discovery requests. In responding to these requests, the State produced **all** of the information that it identified at the agencies in accordance with Defendants requests for "each and every" fact and "all documents" related to their requests. The State did this because Defendants requested it and, as a result, Defendants received a large volume of documents. Those documents were by necessity produced as they are kept in the

[1] While the Court notes that the State has produced voluminous information on its sampling activities, the Court erroneously notes that "[p]laintiff evidently never supplemented their [sic] interrogatory responses to indicate which documents were responsive to which interrogatories" and that "[p]laintiff has provided no supplemental response to the interrogatories indicating which, if any interrogatories, correspond to any documents produced in the supplemental production. Further no supplemental response appears forthcoming." Order at p. 3, fn. 3 and p. 7. The State did supplement its response to the Cobb-Vantress First Set of Interrogatories on February 14, 2007, although that was not mentioned at the hearing and the State is in the process of supplementing its response to the other interrogatories based on its supplemental production of sampling data and other information.

ordinary course of business at the state agencies. See Exhibits 1-4. Accordingly, the State's official records were not Bates stamped and it was not possible for the State to reference a Bates range for the documents produced. Rather, the State used the information contained on the index of the boxes to identify responsive information.[2] Apparently, the Tyson Defendants chose to copy only a subset of the responsive information produced by the State and Bates stamped only those selected documents. The State does not have access to these Bates stamped documents and, in any event, even if the Tyson Defendants were willing to share those documents with the State, the State could not rely on a partial copy of its production to respond. Thus, there is no common set of identically Bates numbered documents held by both the State and Defendants from which Rule 33(d) designations can be made.

It is important to note that the State did not simply designate all boxes as responsive to all inquiries. It meticulously reviewed each box and file contained in each box to identify the responsive information for Defendants. Additionally, it is important to note that while the Court expressed some skepticism that responsive documents could fill a hundred boxes, this was the case in certain instances. For example, with regard to Tyson Foods Interrogatory No. 6 (all permits, licenses or other forms of government authorizations for entities dealing with chemicals, fertilizers and waste in the Illinois River Watershed and all related documents), the Department of Environmental Quality alone has literally hundreds of such files. Accordingly, the State referred the Tyson Defendants to 64 boxes containing these files for the four counties in the Illinois River Watershed, and each file was listed on an index provided and attached to each box.

[2] After Defendants reviewed and sent the State's original documents out to be copied, some of the agencies returned their original documents back to their files. This is not true at every agency, however, as the Oklahoma Water Resources Board has not re-filed the documents given to Defendants for inspection. In addition, in some instances, Defendants' contractor did not return the documents in the same boxes there were produced in which has caused some confusion as to the State's original numbering of these boxes.

Similarly, the State referred the Tyson Defendants in response to Tyson Poultry Interrogatory No. 3 (describe all actions by us to manage, address, control or reduce entry of the contaminants of concern from sources other than Poultry Operations and all related documents) to 61 boxes at the Oklahoma Department of Environmental Quality and 30 boxes at the Oklahoma Water Resources Board. This question encompasses a broad range of actions that the State has taken in the watershed that cannot be simply summarized and the documents related to these actions are voluminous. Every permit file for a discharger in the Illinois River Watershed is an action by the State to manage, address, control or reduce containments of concern from operations other than poultry operations. Every piece of correspondence with the Arkansas Oklahoma Compact Commission is related to the actions the State is taking to manage, address, control or reduce entry of the contaminants of concern from operations other than Poultry, as well as every water quality report or sampling the State has done regarding water quality in the Illinois River Watershed. Even when the State provides more specific designations, it is important to note that this will not necessarily reduce the volume of responsive documents.

At the February 15, 2007 Hearing, the Tyson Defendants selected a few boxes from the State's production to illustrate their concerns to Court about the specificity of the State's designations. The State posited that one explanation for the Tyson Defendants' concern about its boxes not containing responsive information was that the Tyson Defendants did not copy everything the State produced. In its February 26, 2007 Order, the Court indicated that referencing Bates numbers may prevent such issues in the future. Order, at p. 8, fn. 5. As stated above, the State did not Bates stamp its original documents and, accordingly, it is not possible to take that approach. The State believes it did identify responsive information in these boxes with the required specificity. However, if the Tyson Defendants had identified their concern to the

State prior to the hearing, the State could have easily identified the responsive information it produced in the boxes identified at the hearing. They chose not to do so.

Moreover, the Tyson Defendants participated in three document productions at the Oklahoma Department of Environmental Quality, Oklahoma Water Resources Board, and Oklahoma Conservation Commission before expressing any concern with the State's method of designating documents and filing their motion to compel on January 11, 2007. At each such production, the State had an attorney nearby, but not in the examination room, to help Defendants with any questions or problems. The Tenth Circuit has recognized that an offer to individually specify which documents are covered by a Rule 33(c) (now Rule 33(d)) designation is adequate. *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221, 226-27 (10th Cir. 1976) (corporate president agreed to segregate responsive documents). The Tyson Defendants raised no questions about the documents produced or the indices showing which boxes contained Rule 33(d) documents. If the Tyson Defendants had notified the State of its concerns or simply asked for clarification, the State could have identified the information for them with the information they were provided.

For example, counsel for the Tyson Defendants showed the Court "Land Protection Division Box 22" from the Oklahoma Department of Environmental Quality document production. The State had referred the Tyson Defendants to Box 22 as containing responsive information to Cobb-Vantress Interrogatory No. 14 (any consent, decrees, agreed judicial or administrative orders, or settlement agreements obtained by you during the three years preceding the lawsuit and all related documents) and Tyson Foods Interrogatory No. 6 (identify all permits, licenses or other forms of government authorizations for entities dealing with chemicals, fertilizers and waste in the Illinois River Watershed and all related documents). When given to

Defendants for inspection and copying, Land Protection Box 22 contained permit files for Solid Waste Landfills, specifically the North Moody Transfer Station and Tahlequah Solid Waste Transfer Station files. The other 23 boxes from the Land Protection Division were not designated in response to these questions and the two permit files in Box 22 were clearly identified on the index provided and attached to the box.

Counsel for the Tyson Defendants also showed the Court Oklahoma Water Resources Box Water Quality Box 1 and represented to the Court that there was nothing responsive contained in that box to Tyson Chicken Interrogatory No. 4 (reports which the State contends show the IRW has been injured by microbial pathogens). Counsel for the Tyson Defendants did not inform the Court, however, that the State had also referred the defendants for responsive documents in OWRB Box 1 to Tyson Chicken Interrogatory No. 6 (reports about phosphorus and its effects on the environment), Tyson Chicken Interrogatory No. 7 (reports about nitrogen and its effects on the environment), Tyson Poultry Interrogatory No.1 (efforts taken by the State to identify any other factor other than poultry which may have an effect on the environment, Tyson Poultry Interrogatory No. 2 (all actions taken by the State to control the contaminants of concern from poultry), Tyson Poultry Interrogatory No.3 (describe all actions taken by the State to control contaminants of concern from other sources), Tyson Poultry Interrogatory No. 9 (all reports that show we have been injured by phosphorus) and Tyson Poultry Interrogatory No. 10 (all reports that show we have been injured by nitrogen), Tyson Foods Interrogatory No. 8 (all activities to investigate any characteristic of the Water in the IRW), and Tyson Foods Interrogatory No. 11 (all evidence which we contend support our allegation that Defendants' conduct poses an imminent and substantial endangerment). Admittedly, OWRB box one did contain information outside the watershed because that is how the documents were kept in the

normal course of business. However, OWRB Box 1 does, in fact, contain information responsive to all these requests, as well as Tyson Chicken Interrogatory No. 4. For example, the box contained correspondence and reports from the Arkansas Oklahoma Compact Commission, minutes from the Governor's Animal Waste Task Force, Comprehensive Water Management Plans, spread sheets of statistical analysis of water quality in the Illinois River Watershed from 1955 to 1995 (which includes fecal coliform), and reports and correspondence regarding Lake Frances, which is/used to be in the Illinois River Watershed. Thus, the State did produce responsive information in OWRB Box 1.

The State recognizes the Court has found that its method of indexing the documents it produced on-site at the agencies was not adequately specific to meet the requirements of Rule 33(d) and the State does not seek to avoid supplementing its responses. However, as the Order implicitly recognizes by encouraging the parties to confer and arrive at an adequate means of responding, Rule 33(d) does not *require* Bates numbering of responsive documents, so long as they are adequately identified. *Continental Insurance Co. v. Chase Manhattan Mortgage Corp.* 59 Fed. Appx. 830, 838-39 (7th Cir.2003). Given that the Tyson Defendants have asked very broad questions and the State has attempted in good faith to identify all documents produced, the State seeks that the Court grant it relief from the requirement of the Order that it designate documents by Bates and Box number. The State asserts that it is possible to achieve the required degree of specificity without referencing Bates numbers. In fact, such an approach should be adopted because there is no common set of identically Bates numbered documents held by both the State and the Tyson Defendants from which Rule 33(d) designations can be made.

The State has conferred once by telephone with counsel for the Tyson Defendants in an attempt to agree on an appropriate manner of responding which meets the needs of both the State

and the Tyson Defendants. Counsel for the Cargill Defendants listened in on that discussion. The State hopes the parties can come to a mutually satisfactory resolution of this issue, both in order for the State to fulfill its obligations under the Order and Rule 33(d), and to head off further contention between the parties over the adequacy of Defendants' compliance with their own Rule 33(d) designations. However, to date, no such resolution has been reached.

In the absence of the ability to designate documents pursuant to Rule 33(d) designations by Bates number or range, the State asks to be permitted to proceed by reviewing its interrogatory responses and, in keeping with the request of the Tyson Defendants, provide narrative supplemental answers where appropriate. In those instances in which the Tyson Defendants seek identification of categories of documents such as permits or complaints, specific categories of such documents will be listed in the supplemental responses. During forthcoming on-site productions, the State will specifically indicate the location of these categories of documents by the boxes in which they are contained. This complies with the Order at 5, quoting Advisory Committee Notes to the effect that "a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived."

With regard to agencies for which on-site document productions have already been conducted, and thus for which the Tyson Defendants have had the opportunity to inspect designated documents, the State proposes to produce for those interrogatories for which it relies upon a Rule 33(d) designation a similar list of categories of documents pursuant to its Rule 33(d) designations. For example, if the State chooses to make a Rule 33(d) designation in response to an interrogatory, the State will either identify by category and location (i.e. this type of permit file is contained in boxes x-x) or where warranted identify the title of the document and box or location (i.e. bookshelf 4). In those instances in which the Tyson Defendants did not copy

responsive categories of documents and still need them to prepare their defenses, the State will work with the Tyson Defendants in re-producing those documents.

B. Candor requires the State to correct the Court's misapprehension about the extent of its continuing attorney work product and trial preparation claims.

The State's consultants are continuing their task of expert analysis of sampling results, under the direction and supervision of the State's counsel. The State agreed to waive its attorney work product/expert consultant protections for the sampling data and material which was the subject of the State's December 15, 2006 offer and the Court's January 5, 2007 order. The State has not waived, and continues to assert, the protections of Rule 26(a)(3) and (4) for its trial preparation and expert consultant materials heretofore asserted. Because LCvR 26.4(b) does not require parties to place on their privilege logs "written communications between a party and its trial counsel after commencement of the action and the work product created after commencement of the action," the State has not listed such material on its privilege log. Further, the State continues to assert privileges and has provided the defendants with privilege logs at the various agency productions. The State will continue to work with Defendants in resolving any agency privilege log issues.

The State is not asking the Court to alter its Order with regard to any privilege issue, but wants the Court and Defendants to understand it continues to assert its claims of attorney work product and trial preparation material protection, except for those matters produced or to be produced pursuant to its December 15, 2006 offer and the Court's January 5, 2007 order.

C. The Court should relieve the State of responsibility for further responding to certain interrogatories, and should allow more time for compliance with the Order.

In its Order, the Court required the State to supplement its answers to certain interrogatories, including Tyson Foods 3 and 4. Order at 11. These interrogatories called for:

Tyson Foods 3

> Please Identify each tract of real property situated within the IRW in which the State of Oklahoma currently owns, or has owned during the three years prior to the filing of the Lawsuit, any legal or equitable interest (including but not limited to, ownership in fee, surface ownership, mineral ownership, lease or license), and indicate for each such tract the specific time periods in which the State of Oklahoma owned an interest, the nature of the interest, the specific use(s) for and activity(ies) that has been conducted on the tract during the period the State of Oklahoma owned the interest. Also please identify any Documents that Relate to the State of Oklahoma's interest in such property.

Tyson Food 4

> For each specific tract of real property identified in Your answer to the preceding Interrogatory on which You or any other person or Entity has collected, handled, treated, stored, or disposed of any type of chemicals, fertilizers or waste material (including but not limited to solid wastes, semi-solid wastes, liquid wastes, industrial wastes, municipal, industrial wastes, municipal, industrial , or household waste water, grey water, sewage or effluent of any type), please Identify the specific materials collected, handled, treated, stored, used or disposed of by chemical composition, volume, and processes employed for each month of the term of the State of Oklahoma's ownership or interest. Also please Identify any Documents that Relate to those activities.

In its responses to those interrogatories, the State had objected that these interrogatories were overly broad, oppressive, unduly burdensome and expensive to answer, especially since they referred to each and every tract of real property owned or controlled by the State, and all of the chemicals, fertilizers or waste, used or disposed of thereon. The State further responded that the County Clerks' offices of the counties encompassing the IRW would have records pertinent to the property owned by the State therein. The Tyson Defendants, as easily as the State, could consult those records.

By their literal terms, these interrogatories ask about every state agency office rented, every state highway, every state park or wildlife area, and all of the chemicals—which could literally encompass any substance—used or disposed of on all of that property. Additionally, these interrogatories require identification of every document related to both the State's interest

in the property, and the use and disposal of chemicals, fertilizers and wastes. While the State is developing a database of all the property it owns, at the present time the State does not have a central registry of real property it owns or rents. The State would have to refer to county land or tax records to discover this information, a step which is as readily available to Tyson Defendants as to the State. The State certainly does not have any central source of information about all chemicals, fertilizers or waste.

While some information of this nature may be relevant to the claims and defenses in this case, all of this information certainly is not relevant. Full compliance with this requested discovery "outweighs its likely benefit, taking into account the needs of the case, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2). The State respectfully asks the Court to grant it protection relieving it of the obligation to further responding to these two interrogatories, or limiting the scope of its response to a reasonable extent consistent with the actual needs of the case.

Additionally, acting in complete good faith, given the need to devise an appropriate manner of specifying documents under Rule 33(d), and then doing so, as well as revising interrogatories found in the Order to require revision, the Order's original 30 day compliance requirement cannot be met. The State respectfully requests another 30 days from the issuance of its first order to comply.

IV. Conclusion

WHEREFORE, premises considered, this Court should grant the State's Motion for Reconsideration of the Court's February 26, 2007 Opinion and Order.

Respectfully Submitted,

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